TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 45

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1956
CERTIORARI GRANTED JANUARY 14, 1957

Supreme Court of the United States

OCTOBER TERM, 1956

No. 574

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the First Circuit	1	1
Appellant's record appendix consisting of proceedings transpiring in the United States District Court for the District of Massachusetts	1	1
Relevant docket entries	1	1
Complaint	3	3
Defendant's answer	4	4
Motion to substitute answer	5	4
Defendant's substitute answer	5	4
Plaintiff's answer to defendant's counterclaim	6	5
Plaintiff's interrogatories addressed to the defendant	7	6
Defendant's answers to plaintiff's interrogatories	24	20
Defendant's objections to plaintiff's interrogatories	33	28
Transcript of hearing on defendant's objections to plaintiff's interrogatories	34	28
Plaintiff's motion for summary judgment	39	34
Affidavit of Assistant Auditors of Freight Receipts	41	36
Defendant's motion for entry of judgment	43	37
Judgment	43	37
Notice of appeal	44	38

	Original	Print
Argument and submission of case	45	38
Opinion, Magruder, J.	47	39
Judgment	57	47
Note re mandate	57	48
Clerk's certificate (omitted in printing)	58	48
Order extending time to file certiorari	59	48
Order allowing certiorari	60	48

[fol. 1] IN THE

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5090

UNITED STATES OF AMERICA, *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Appellee*

On Appeal From the United States District Court for the District of Massachusetts

APPELLANT'S RECORD APPENDIX

IN UNITED STATES DISTRICT COURT

RELEVANT DOCKET ENTRIES

1953
May 14 Complaint filed. Summons issued

* * * * *

1954
Feb. 1 Defendant's answer filed

* * * * *

Nov. 3 Defendant's motion to substitute answer filed (Substitute answer annexed thereto)
23 Plaintiff's answers to defendant's counterclaim, filed
26 WYZANSKI, D.J. Motion allowed by agreement—re defendant's motion to substitute answer

[fol. 2] 1955
May 31 Plaintiff's interogatories to the defendant, filed

* * * * *

June 24 Defendant's answers to plaintiff's interrogatories, filed

24 Defendant's objections to plaintiff's interrogatories, filed

Oct. 31 WYZANSKI, D.J. Hearing on defendant's objections to plaintiff's interrogatories, motion for summary judgment for defendant to be filed—Judgment to be entered for plaintiff in accordance with the Memorandum of Court.

31 Memorandum in support of issuance of a pretrial order requiring plaintiff to amend its complaint, filed

Nov. 4 Plaintiff's motion for summary judgment filed with supporting affidavit annexed thereto.

* * * * *

15 Defendant's motion for entry of judgment with defendant's memorandum in support of its motion for entry of judgment, filed

15 WYZANSKI, D.J. Defendant's motion for entry of judgment in its favor, denied.

15 WYZANSKI, D.J. Plaintiff's motion for summary judgment allowed.

23 WYZANSKI, D.J. Upon consideration of plaintiff's motion for summary judgment supported by an affidavit showing one cash payment of $117.77 by the defendant, and allowable credits to the defendant in the sum of $740.19 leaving a balance due plaintiff of $402.84; and upon defendant's motion for entry of judgment on the ground that plaintiff has failed to plead facts entitling it to recover, it is

[fol. 3] Ordered 1—Defendant's motion, denied
2—Plaintiff to recover from the defendant in sum of $402.84.

1956

Jan. 20 Notice of appeal filed by the defendant.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 14, 1953

1. The plaintiff is a corporation organized under the laws of Massachusetts, is a common carrier by rail in interstate commerce and is subject to the jurisdiction of the Interstate Commerce Commission.

2. On or about August 8, 1950 the plaintiff delivered a carload of household effects to the defendant at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the defendant and bearing Government bill of lading number X 17377473.

3. By authority of applicable tariffs duly published and filed with the Interstate Commerce Commission, and of applicable quotations of rates made to the defendant under Section 22 of the Interstate Commerce Act by the plaintiff and prior carriers, the charges lawfully assessable for the transportation services set forth in paragraph two hereinabove are $1,143.03.

4. On or about June 14, 1951 under its bill number F-251856 the plaintiff made demand upon the defendant for payment of $1,143.03 which demand the defendant refused and has continued to refuse. In communicating to the plaintiff its written declinations to pay said $1,143.03, the General Accounting Office of the defendant has made reference to the following Government file numbers in said declinations:

[fol. 4] T-GAO-MRF-470347-12/44-WMW-F-165360
T-GAO-MRF-458243-12/44-WMW-F-13172
T-GAO-MRF-476904-12/44-WMW-F-164498

5. Under the provisions of the Tucker Act, 28 U.S.C., Sec. 1346, the plaintiff therefore demands judgment against the defendant in the amount of $1,143.03 with interest from August 8, 1950 and with costs of this suit.

[Signature omitted]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER—Filed February 1, 1954

Now comes the United States of America in the above-entitled case and answers to the Complaint as follows:

1. The defendant admits the allegations contained in paragraph 1.

2. The defendant denies the allegations contained in paragraph 2 and calls upon the plaintiff to prove the same.

3. The defendant neither admits nor denies the allegations contained in paragraph 3 and calls upon the plaintiff to prove the same.

4. The defendant neither admits nor denies the allegations contained in paragraph 4 and calls upon the plaintiff to prove the same.

5. The defendant denies that it owes the plaintiff the amount alleged in paragraph 5.

[Signature and Certificate of Service omitted]

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION TO SUBSTITUTE ANSWER—Filed November 3, 1954

Now comes the United States of America in the above-entitled case and moves for leave to strike out its Answer heretofore filed and to substitute therefor the Answer hereto annexed.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S SUBSTITUTE ANSWER—Filed November 3, 1954

Now comes the United States of America in the above-entitled case and answers to the Complaint as follows:

1. The defendant admits the allegations contained in paragraph 1.

2. The defendant admits the allegations contained in paragraph 2.

3. The defendant admits the allegations contained in paragraph 3.

4. The defendant denies the allegations contained in paragraph 4 to the effect that the sum of $1,143.03 is due and owing to the plaintiff, but states that of the said sum the plaintiff was allowed the full amount of $1,143.03, with $117.77 being paid by check No. 846000, July 16, 1951, and $1,025.26 being credited, under the provisions of Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U.S.C., 66, to overpayments made in the payment of freight charges on plaintiff's bills as follows:

	Bill No. F 131712 amount overpaid	$124.22
	Bill No. F 164498 amount overpaid	169.01
[fol. 6]	Bill No. F 165360 amount overpaid	254.32
	Bill No. F 235076 amount overpaid	477.71

The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered.

5. The defendant denies that it owes the plaintiff the amount alleged in paragraph 5, and demands judgment in its favor and for its costs.

[Signature omitted]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM—Filed November 23, 1954

Now comes the Plaintiff and makes answer to the counterclaim as alleged in DEFENDANT'S SUBSTITUTE ANSWER:

The plaintiff says that it did receive the check in the amount of $117.77, all as recited by the defendant, leaving

the balance due and to this date unpaid in the amount of $1025.26.

The plaintiff denies that it overcharged the defendant with respect to bills Nos. F 131712, F 164498, F 165360 and F 235076; and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 [fol. 7] was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S INTERROGATORIES ADDRESSED TO THE DEFENDANT—Filed May 31, 1955

The plaintiff hereby serves upon the defendant written interrogatories, as below, to be answered by a duly authorized officer of said defendant under oath and in all other ways pursuant to the provisions of Rule 33 of the Rules of Civil Procedure for the United States District Courts.

1. Please state your name, address, official position, and authority for answering the following interrogatories on behalf of the defendant.
2. Did the defendant enter into a transportation contract with the plaintiff on or about 18 July 1950, being more particularly identified as Government Bill of Lading No. N-17377473?
3. Did the plaintiff complete its performance of the transportation contract, aforesaid, by delivering a carload of household effects to the defendant at Newport, Rhode Island on or about 8 August 1950?
4. Was $1143.03 the lawful charge for the aforementioned transportation services?
5. Did the plaintiff make demand upon the defendant for payment for the aforesaid transportation services on or about 14 June 1951 by presenting its Bill No. F-251856 in the amount of $1143.03?

[fol. 8] 6. (a) Did the defendant pay the aforesaid bill?

(b) If your answer is in the affirmative, please give all details, such as dates, amounts, voucher numbers, etc.

7. Did the defendant enter into a transportation contract with the plaintiff on or about 15 September 1944, being more particularly identified as Government Bill of Lading No. N-8666578?

8. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

9. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

10. Was the car that was furnished the car actually used in the transportation involved?

11. How long did it take to load the car furnished with the goods to be hauled?

12. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details including the name, address, rank (if any), principal duty, and authority of such agent or agents (if more than one, please give details on each).

13. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

[fol. 9] (b) If your answer is in the negative, please state when such figures were typed therein and by whom.

14. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the time, date, place and form of such complaint, identifying the agent of

the defendant who made the complaint and identifying the person to whom such complaint was made.

15. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

16. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

17. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-8666578 by carrying two cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts?

18. Was $194.26 the lawful charge for such transportation on a car of the size furnished and used?

[fol. 10] 19. Did the plaintiff bill the defendant for such transportation in the amount of $194.26 on its Bill No. E-165360 dated 21 November 1944?

20. (a) Did the defendant pay the plaintiff the said $194.26?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

21. (a) Did the defendant determine that $194.26 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-8666578?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and

authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination, giving all details.

22. (a) With reference to letter of Transportation Division, General Accounting Office of defendant to plaintiff dated 29 March 1951 bearing your reference number T-GAO-Von-470347-12 44-Wakefield dealing with plaintiff's aforesaid Bill No. F-165360, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which authorizes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment": Did the defendant intend thereby to deny the applicability hereto of Service Order 68, so called?

[fol. 114] (b) If your answer is in the affirmative, please give all the details including the identification and authority of person making such determination.

(c) If your answer is in the negative, what was the purpose of the language quoted above?

23. Was the alleged excess referred to in paragraph 21, above, said to be in the amount of $57.46?

24. (a) Was an amount representing that $57.46 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

25. Did the defendant enter into a transportation contract with the plaintiff on or about 15 October 1944, being more particularly identified as Government Bill of Lading No. N-9638610?

26. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or

agents of the defendant who prepared and signed said Bill of Lading.

27. (a) Was a car of the specified size furnished?
(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

28. Was the car that was furnished the car actually used in the transportation involved?

29. How long did it take to load the car furnished with the goods to be hauled?

30. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

[fol. 12] (b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty and authority of such agent or agents (if more than one, please give details on each).

31. (a) Did the size in feet of car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?
(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

32. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?
(b) If your answer is in the affirmative, please give all the details, including the time, date, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

33. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?
(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

34. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

[fol. 13] 35. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-9638610 by carrying 2 cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts?

36. Was $166.90 the lawful charge for such transportation on a car of the size furnished and used?

37. Did the plaintiff bill the defendant for such transportation in the amount of $166.90 on its Bill No. F-165360 dated 21 November 1944?

38. (a) Did the defendant pay the plaintiff the said $166.90?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used, and billed.

39. (a) Did the defendant determine that $166.90 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-9638610?

(b) If your answer is in the affirmative, please give all the details including the date on which the determination was made, the identification and authority of the person making the determination and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination, giving all details.

40. You are hereby asked the same question including parts (a), (b) and (c) as was asked in paragraph 22, above, insofar as it pertains to Bill of Lading No. N-9638610?

41. Was the alleged excess referred to in paragraph 39, above, said to be in the amount of $30.10?

[fol. 14] 42. (a) Was an amount representing that $30.10 deducted by the Government from a payment due

the plaintiff for subsequent transportation service?

(b) If your answer was in the affirmative, please give all the details including dates, authority, receipts given, and all other pertinent data.

43. Did the defendant enter into a transportation contract with the plaintiff on or about 15 October 1944, being more particularly identified as Government Bill of Lading No. N-9638578?

44. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

45. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details including the size of the car furnished.

46. Was the car that was furnished the car actually used in the transportation involved?

47. How long did it take to load the car furnished with the goods to be hauled?

48. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such agent or agents (if more than one, please give details on each).

49. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

[fol. 15] (b) If your answer is in the negative, please state when such figures were typed therein and by whom.

50. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the time, date, place and

form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

51. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

52. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including a certified copy of any report made thereon.

53. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-9638578 by carrying 2 cartons of internal combustion engines from Detroit, Michigan to the defendant at Neponset, Massachusetts.

54. Was $194.26 the lawful charge for such transportation on a car of the size furnished and used?

[fol. 16] 55. Did the plaintiff bill the defendant for such transportation in the amount of $194.26 on its Bill No. F-165360 dated 21 November 1944?

56. (a) Did the defendant pay to the plaintiff the said $194.26?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used, and billed.

57. (a) Did the defendant determine that $194.26 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-9638578?

(b) If your answer is in the affirmative, please give all the details, including the date on which the

determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all details.

58. You are hereby asked the same question including parts (a), (b) and (c) as was asked in paragraph 22, above, insofar as it pertains to Bill of Lading No. N-9638610.

59. Was the alleged excess referred to in paragraph 57, above, said to be in the amount of $57.46?

60. (a) Was an amount representing that $57.46 deducted by the defendant from a payment to the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

[fol. 17] 61. Did the defendant enter into a transportation contract with the plaintiff on or about 1 February 1944, being more particularly identified as Government Bill of Lading No. N-2579532?

62. (a) Did that Bill of Lading call for a car of specific size in feet?

(b) If your answer is in the affirmative, please give all the details including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

63. (a) Was a car of the specified size furnished?

(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

64. Was the car that was furnished the car actually used in the transportation involved?

65. How long did it take to load the car furnished with the goods to be hauled?

66. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?

(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such

agent or agents (if more than one, please give details on each).

67. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?

(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

68. (a) Was any complaint made about the size in feet of the car furnished being larger than the size in feet of the car ordered?

[fol. 18] (b) If your answer is in the affirmative, please give all the details; including the time, date, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

69. (a) Was a car of the size in feet of the car ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

70. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the certified copy of any report made thereon.

71. Did the plaintiff complete the performance of the transportation contract in Government Bill of Lading No. N-2579532 by carrying 10 rubbish containers NOIBN 1 box bolts 20 wing nuts 20 spaces 40 in bucket No. 10 from Knoxville, Tennessee to the defendant at Hingham, Massachusetts?

72. Was $417.60 the lawful charge for such transportation on a car of the size furnished?

73. Did the plaintiff bill the defendant for such transportation in the amount of $417.60 on its Bill No.

F-131712 dated 10 April 1944 and resubmitted on 18 November 1944?

74. (a) Did the defendant pay the plaintiff the said $417.60?

[fol. 19] (b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at the time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

75. (a) Did the defendant determine that $417.60 was an excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-2579532?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all the details.

76. (a) With reference to the letter of the Transportation Division, General Accounting Office, of the defendant to the plaintiff dated 2 April 1951 bearing your reference No. T-GAO-Vou-458243-12/44-Wakefield dealing with plaintiff's aforesaid Bill No. F-131712, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which authorizes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment": Did the defendant intend thereby to deny the applicabiiity hereto of Service Order 68, so called?

(b) If your answer is in the affirmative, please give all the details, including the identification and authority of the person making such determination.

[fol. 20] (c) If your answer is in the negative, what was the purpose of the language quoted above?

77. Was the alleged excess referred to in paragraph 75, above, said to be in the amount of $124.22?

78. (a) Was an amount representing that $124.22 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?
(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

79. Did the defendant enter into a transportation contract with the plaintiff on or about 15 September 1944, being more particularly identified as Government Bill of Lading No. N-573831?

80. (a) Did that Bill of Lading call for a car of specific size in feet?
(b) If your answer is in the affirmative, please give all the details, including the size of the car and the identification and authority of the agent or agents of the defendant who prepared and signed said Bill of Lading.

81. (a) Was a car of the specified size furnished?
(b) If your answer is in the negative, please give all the details, including the size of the car furnished.

82. Was the car that was furnished the car actually used in the transportation involved?

83. How long did it take to load the car furnished with the goods to be hauled?

84. (a) Was any agent of the defendant present or available to have been present at the loading of the car furnished?
(b) If your answer is in the affirmative, please give all the details, including the name, address, rank (if any), principal duty, and authority of such [fol. 21] agent or agents (if more than one, please give details on each).

85. (a) Did the size in feet of the car furnished appear in typewritten figures on said Bill of Lading at the time the defendant's agent signed it?
(b) If your answer is in the negative, please state when such figures were typed therein and by whom.

86. (a) Was any complaint made about the size in feet

of the car furnished being larger than the size in feet of the car ordered?

(b) If your answer is in the affirmative, please give all the details, including the date, time, place and form of such complaint, identifying the agent of the defendant who made the complaint and identifying the person to whom such complaint was made.

87. (a) Was a car of the size in feet ordered available for the use contemplated by said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details, including the name and other identifying data of the person who made that determination, attaching a certified copy of any report of same that was made.

88. (a) Was any attempt made by any agent of the defendant to determine whether or not a car of the same size in feet as the car ordered was available for use under said Bill of Lading?

(b) If your answer is in the affirmative, please give all the details including a certified copy of any report made thereon.

89. Did the plaintiff complete its performance of the transportation contract in Government Bill of Lading No. N-5738315 by carrying 1 No. 1 CT-9 tractor crane, 1 No. 1 boom, 2 bxs. spares for CT-9 and T-9, 4 [fol. 22] bxs. Grousers, 1 bx. tools, NOIBN iron from Lee Hall, Virginia to the defendant at Quonset Point, Davisville, Rhode Island?

90. Was $209.95 the lawful charge for such transportation on a car of the size furnished and used?

91. Did the plaintiff bill the defendant for such transportation in the amount of $209.95 on its Bill No. F-164498 dated 14 November 1944?

92. (a) Did the defendant pay the plaintiff the said $209.95?

(b) If your answer is in the affirmative, please state the date and form of such payment and whether or not at that time any complaint was made by anyone to the plaintiff concerning the size in feet of the car furnished, used and billed.

93. (a) Did the defendant determine that $209.95 was an

excessive charge for the transportation furnished by the plaintiff under said Government Bill of Lading No. N-5738315?

(b) If your answer is in the affirmative, please give all the details, including the date on which the determination was made, the identification and authority of the person making the determination, and the basis for such determination.

(c) If your answer is in the affirmative, please give the date on which the plaintiff was first notified of such determination; giving all details.

94. (a) With reference to letter of Transportation Division, General Accounting Office, of the defendant to the plaintiff dated 29 March 1951 bearing your reference No. T-GAO-Von-476904: 12.44-Wakefield dealing with plaintiff's aforesaid Bill No. F-164498, and more particularly with reference to the second paragraph therein, namely, "No authority has been found which author-
[fol. 23] izes approval of a payment of public monies for services rendered by a carrier in excess of those called for by the bill of lading contract and sufficient for the transportation of the shipment"; Did the defendant intend thereby to deny the applicability hereto of Service Order 68, so called?

(b) If your answer is in the affirmative, please give all the details, including the identification and authority of the person making such determination.

(c) If your answer is in the negative, what was the purpose of the language quoted above?

95. Was the alleged excess referred to in paragraph 93, above, said to be in the amount of $80.35?

96. (a) Was an amount representing that $80.35 deducted by the defendant from a payment due the plaintiff for subsequent transportation services?

(b) If your answer is in the affirmative, please give all the details, including dates, authority, receipts given, etc.

97. (a) Did the Secretary of War on or about 30 October 1943 petition the Interstate Commerce Com-

mission to amend Service Order 68, so called, so as to exempt from the effect thereof shipments to or by any organization or installation of the War Department insofar as said Service Order 68 suspended paragraphs 2 (a) and 6 (a) of Rule 34 of Consolidated Freight Classification No. 14?

(b) If your answer is in the affirmative, please give all the details, enclosing a certified copy of such petition, together with certified copies of any orders issued by said Commission in reference to such petition, and for a certainty a certified copy of the order of said Commission disposing of said petition.

[Signature and Certificate of Service omitted]

[fol. 24] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES—Filed June 24, 1955

William Levenstein having been duly sworn, makes the following answers to interrogatories served upon defendant in the above-entitled case.

1. Affiant is William Levenstein, 2907 56th Place, Cheverly, Maryland, whose official position is Transportation Specialist, Special Reports Section, Transportation Division, United States General Accounting Office, Washington, D.C., among whose official duties is the preparation of answers to interrogatories served upon the United States involving litigation arising under Section 322 of the Transportation Act of 1940 (54 Stat. 955; 49 U.S.C. 66).

5. Yes.

6. (a). Yes.

(b). The sum of $177.77 was paid to plaintiff by United States Treasury check No. 846000 dated July 16, 1951. The balance of $1,025.26 was paid to plaintiff by means of credits because of overpayments made to plaintiff in payment of freight charges on plaintiff's bills numbered: F-131712, F-164498, F-165360 and F-235076.

7. Yes.

8 (a). Yes.

(b). Bill of Lading No. N-8666578 called for an open freight car forty feet in length. Said Bill of Lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR, in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan.

9 (a). No.

(b). In lieu of the forty foot car ordered a forty-six foot car was furnished for reasons peculiarly within the [fol. 25] knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

10. Yes.

13 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

15 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

17. Yes.

18. Yes, however, $194.26 was not the lawful charge for *the* car furnished by the initial carrier.

19. Yes.

20 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

21 (a). Yes.

(b). On or about November 7, 1950, in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $194.26 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-six foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of

$57.46 for transportation services in connection with Bill of Lading No. N-8666578.

[fol. 26] 22 (a). Yes.

(b). The letter referred to in 22 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

23. Yes.

24 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt. S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

25. Yes.

26 (a). Yes.

(b). Bill of Lading No. N-9638610 called for an open freight car forty feet in length. Said bill of lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR, in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval Material, Bureau of Supplies and Accounts, Navy Department, Detroit Michigan.

27 (a). No.

(b). In lieu of the forty foot car ordered a forty-two foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

28. Yes.

31 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

[fol. 27] 33 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

35. Yes.

36. Yes, however, $166.90 was not the lawful charge for *the* car furnished by the initial carrier.

37. Yes.

38 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

39 (a). Yes.

(b). On or about November 7, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $166.90 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-two foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $30.10 for transportation services in connection with Bill of Lading No. N-9638610.

40 (a). Yes.

(b). The letter referred to in 40 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

41. Yes.

[fol. 28] 42 (a). Yes.

(b). The sum of $30.10 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

43. Yes.

44 (a). Yes.

(b). Bill of Lading No. N-9638578 called for an open freight car forty feet in length. Said bill of lading was prepared and signed in the performance of official duties by Lt. (j.g.) E. V. Weissbrodt, USNR in behalf of R. Velz, Captain, USN (Ret.) Officer and Inspector of Naval

Material, Bureau of Supplies and Accounts, Navy Department, Detroit, Michigan.

45 (a). No.

(b). In lieu of the forty foot car ordered a forty-six foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway, and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

46. Yes.

49 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

51 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Pere Marquette Railway.

53. Yes.

54. Yes, however, $194.26 was not the lawful charge for *the* car furnished by the initial carrier.

[fol. 29] 55. Yes.

56 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 37812 on or about December 18, 1944.

57 (a). Yes.

(b). On or about November 7, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $57.46 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the forty-six foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 7, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $57.46 for transportation services in connection with Bill of Lading No. N-9638578.

58 (a). Yes.

(b). The letter referred to in 58(a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Trans-

portation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

59 Yes.

60 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in accordance with his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

61. Yes.

[fol. 30] 62 (a). Yes.

(b). Bill of lading No. N-2579532 called for an open freight car 52 feet in length. Said bill of lading was prepared and signed in the performance of official duties by I. J. Pherson, Resident Inspector of Naval Material, Knoxville, Tennessee.

63 (a). No.

(b). In lieu of the fifty-two foot car ordered a sixty-five foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Southern Railway Company and defendant is without knowledge of the reasons for the failure to furnish the fifty-two foot car ordered.

64. Yes.

67 (a). Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on said Bill of Lading.

69 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and/or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and/or the initial carrier, the Southern Railway Company.

71. Yes.

72. Yes, however, $417.60 was not the lawful charge for *the* car furnished by the initial carrier.

73. Yes.

74 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 368459 on or about December 11, 1944.

75 (a). Yes.

(b). On or about November 21, 1950 in performance of their official duties Ralph Gertler and Lois A. Gammage, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, [fol. 31] determined that $417.60 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the fifty-two foot car ordered and not for payment of charges for the sixty-five foot car furnished.

(c). Defendant notified plaintiff of such determination on or about November 21, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $124.22 for transportation services in connection with Bill of Lading No. X-2579532.

16 (a). Yes.

(b). The letter referred to in 76 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

77. Yes.

78 (a). Yes.

(b). The sum of $124.22 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN, Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

79. Yes.

80 (a). Yes.

(b). Bill of Lading No. X-5738315 called for an open freight car forty feet in length. Said Bill of Lading was prepared and signed in the performance of official duties by Ensign J. A. Nellor, USNR in behalf of Commander L. C. Fuller, S.C., USN, Supply Officer U.S. Naval Mine Depot, Yorktown, Virginia.

81 (a). No.

(b). In lieu of the forty foot car ordered a fifty foot car was furnished for reasons peculiarly within the knowledge of plaintiff and/or the initial carrier, the Chesapeake [fol. 32] and Ohio Railway Company, and defendant is without knowledge of the reasons for the failure to furnish the forty foot car ordered.

82. Yes.

85. Defendant is without knowledge of the exact time when the size in feet of the car furnished was typed on the Bill of Lading.

87 (a). Defendant is without knowledge of whether a car of the size in feet ordered by defendant was available to plaintiff and or the initial carrier. Such information is peculiarly within the knowledge of plaintiff and or the initial carrier, the Chesapeake and Ohio Railway Company.

89. Yes.

90. Yes, however, $209.95 was not the lawful charge for *the* car furnished by the initial carrier.

91. Yes.

92 (a). Yes.

(b). Plaintiff was paid by United States Treasury check No. 373738 on or about December 21, 1944.

93 (a). Yes.

(b). On or about September 1, 1950 in performance of their official duties Ralph Gertler and Meredith A. Palmer, respectively Reviewer and Examiner of the Transportation Division, United States General Accounting Office, determined that $80.35 was an excessive charge in that plaintiff was entitled to be paid the lawful charges for the forty foot car ordered and not for payment of charges for the fifty foot car furnished.

(c). Defendant notified plaintiff of such determination on or about September 1, 1950 by forwarding to plaintiff GAO Form 1003 advising plaintiff of an overpayment of $80.35 for transportation services in connection with Bill of Lading No. N-5738315.

[fol. 33] 94 (a). Yes.

(b). The letter referred to in 94 (a), *supra*, was issued by C. A. Cornell, Chief, Freight Review Section, Transportation Division, United States General Accounting Office, whose official duties included the preparation of such letters.

95. Yes.

96 (a). Yes.

(b). The sum of $57.46 was deducted in payment of plaintiff's bill No. F-251856 dated June 14, 1951 by A. R. Murphy, Lt., S.C., USNR for J. E. Lewis, Lt., S.C., USN.

Disbursing Officer in the performance of his official duties and in accordance with the provisions of Section 322 of the Transportation Act of 1940.

/s/ William Levenstein
WILLIAM LEVENSTEIN

June 16, 1955

Sworn to before me this 16th day of June, 1955.

DOROTHY R. NIEMANN
Notary Public
My Commission Expires Aug. 14, 1956

(Seal)

IN UNITED STATES DISTRICT COURT

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATIONS—
Filed June 24, 1955

Comes now defendant, pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure (Title 28 U.S.C.) and for the reasons set forth in the attached memorandum, objects to the following numbered interrogatories served upon defendant:
[fol. 34] 2, 3, 4, 11, 12(a), 12(b), 14(a), 14(b), 16(a), 16(b), 20(b) [in part], 29, 30(a), 30(b), 32(a), 32(b), 34(a), 34(b), 38(b) [in part], 47, 48(a), 48(b), 50(a), 50(b), 52(a), 52(b), 65, 66(a), 66(b), 68(a), 68(b), 70(a), 70(b), 74(b) [in part], 83, 84(a), 84(b), 86(a), 86(b), 88(a), 88(b), 92(b) [in part], 97(a) and 97(b).

[Signatures omitted]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF HEARING ON DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORIES—October 31, 1955

* * * * *

2 The Clerk. Civil Action 53-560, The New York, New Haven & Hartford Railroad Company v. United States.

The Court. This is the New Haven case. I have read the briefs.

Mr. Urbano. Your Honor, may I present to the Court Mr. James Prentice from the Department of Justice, who will represent the government in this matter.

The Court. Very glad to have you, sir.

Mr. Prentice. Thank you.

The Court. I have looked at the papers, so you may proceed. Defendant's objections to plaintiff's interrogatories, and there is some request?

Mr. Prentice. Yes, your Honor. Actually the government has requested a pretrial conference on this matter.

The Court. Yes, I will hear you on the whole thing because I have read the statement. I assume Mr. Sweeney has had an ample opportunity to examine it. Have you?

Mr. Sweeney. Yes, I have. But I also have not had adequate opportunity to resist their pressing for a pretrial. I wrote them letter after letter, and I would prefer not to be badgered into a pretrial.

The Court. I didn't say I was going to give a pretrial but this is argument as to why I should give a pretrial.

[fol. 35] Mr. Prentice. May I approach it first, your Honor, from the view of why we should have a pretrial?

The Court. All right. It seems to me a very simple case.

Mr. Prentice. I didn't say it is complex. I believe if we have a pretrial conference which will resolve the issues between the parties with respect to the burden of proof, we can have a comparatively quick decision in this case and many other cases in this court between the carriers.

The Court. It seems to me to be a perfectly simple case. It is a suit upon a contract in which the defendant has other claims arising by way of, literally, of setoff or its equivalent under contract law. It is not a suit in quasi contract: it is a suit upon the contract. Is that not so?

Mr. Prentice. I believe that is correct, your Honor.

The Court. And in a suit upon the contract is it not so that if there is any attempt to set off other contractual claims, whoever attempts to set off the other contractual claims has the burden of showing there are other claims?

Mr. Prentice. Not the way we look at it, your Honor. We believe this is an action by carriers to recover money wrongfully withheld authorized by statute, and in showing it is entitled to this money it must show they were wrongfully withheld and it is entitled to the money. The plaintiff sues upon a contract as to which there is no dispute between the parties at all, and there could be
4 no dispute because the statute authorized only that deductions be made where sums are otherwise due to the carrier. There could be no dispute. The carrier is asserting the government erred in withholding moneys which it says are due it. We believe it is the carrier's duty to plead facts and to prove that it is entitled to this money which it is claiming.

The Court. As I understand it, your view is that the carrier must bear the burden of showing that from the beginning of the world to the date of these presents there are no claims which the United States has against it. Isn't that your view?

Mr. Prentice. I don't think it is quite that broad, your Honor.

[fol. 36] The Court. Why?

Mr. Prentice. We say this is one continuing transaction with respect to these wartime contracts.

The Court. Why?

Mr. Prentice. Because it had elements permitted by statute; first, the shipment was made, the carrier presented a bill; the government had no opportunity to then decide whether it agreed to it; the statute then said, you will review it after payment; then you will state to the government what your position is as to the rate; you then negotiate with the carrier and if they do not agree you are stuck. That to me is one series of contractual negotiations delayed because of the fact of prompt payment upon presentation; negotiations on the contract are de-
5 layed until after payment, which is unusual but the statute requires it. We are here now because we have never agreed as to the contract rate. We have never agreed upon the rate furnished in the contract. The plaintiff comes into court—

The Court. Oh, I think there is no doubt there are complex problems involving other contracts; but that isn't

the issue which is at the moment raised. The issue which is just at the moment raised is whether the plaintiff must show anything except the liability of the government with respect to this alleged contractual obligation.

Mr. Prentice. That's exactly right, your Honor.

The Court. That is the only issue.

Mr. Prentice. That's exactly right.

The Court. I don't care how complicated the other contracts are.

Mr. Prentice. That's exactly right. I do not contest that. We maintain—and, as a matter of fact, that may be correct. Whether the Court rules whichever party must plead the facts we still come to a separate argument on burden of proof. But we believe these cases may be more easily disposed of if the burden is placed on the carriers. If they must plead it they must prove it. It is a little more complex if we must plead it and they must prove it. But that may prove to be the fact. It may be the law.

I agree with [fol. 37] what your Honor said.

Where the particular factual issue involves a matter that is solely and peculiarly within the knowledge of the carrier, the government could not prove a peculiar factual issue—whether the carrier had available the cars ordered by the government ten years ago. We could not prove that. And yet if the burden is on the government to plead and prove that it is entitled to make the deductions, that would seem to follow to be the result. What we would like, in order as soon as possible to dispose of this case and the others, I would like to have Mr. Sweeney agree the judgment in this case may be entered against the party on whom the Court rules rests the burden of proof. I have not been able to.

The Court. Well, I think he may be able to agree in a moment because as far as I can see there is nothing to your point, and therefore I am quite prepared to enter judgment for the plaintiff, so I don't think he is going to oppose it.

Mr. Prentice. If that could be done and judgment should be entered and an opinion written—

The Court. I'm not going to write any opinion. I'm just going to send it right up if you don't like it.

Mr. Prentice. Well, we would like to do that, your Honor.

The Court. All right.

Mr. Prentice. Because we feel the question is important.

The Court. You don't object, do you?

Mr. Sweeney. No, sir.

The Court. All right. Well, you had better put it in the formal way of a motion, which I think you haven't got in the record here.

Mr. Prentice. That is true.

The Court. And the moment the motion is formally filed I am going to deny it, and I am going to receive a countermotion which is a motion for summary judgment, fortified by affidavit, which you are not going to oppose but you are only going to oppose the view of the law that I have taken here. Isn't that right?

Mr. Prentice. If I may be correct, I assume it is your Honor's holding that the government will have the burden [fol. 38] of showing in this particular category the facts respecting deductions; in other words, the government must show that the carrier was unable to supply the cars furnished by the government.

The Court. No, I am not saying any such thing as that. Quite to the contrary. What I am saying is that where the New York, New Haven & Hartford brings a suit against the United States which is upon a particular contract of carriage it is not the obligation of the plaintiff in that suit to set forth all the previous contracts of carriage which have existed between the New York, New Haven & Hartford and the United States which may give rise to some claims of the United States against the New York, New Haven & Hartford Railroad.

Mr. Prentice. The government didn't content that, your Honor.

The Court. Well, that is the gist of the contention.

Mr. Prentice. No, the contention was the carrier had previous contracts for which the deductions were made.

The Court. Oh.

Mr. Prentice. That means just three or four contracts.

The Court. All right. I say the obligation rests upon

the defendant, the United States, in its pleadings, to set forth the claims which it regards as setoff or similar basis for the reduction of the amount otherwise recoverable by the plaintiff on the principal contract.

Mr. Prentice. It doesn't necessarily follow that your Honor is ruling on the burden of proof question.

The Court. I am most certainly not ruling on the burden of proof.

Mr. Prentice. That is what I want to be clear on, your Honor.

The Court. Yes. You understand that too, don't you, Mr. Sweeney?

Mr. Sweeney. I do, your Honor. But I understand, I think I understand that the reason why you are not ruling is because you are disposing of the case without such a ruling.

9 The Court. That is correct. And now I'm just going to dictate a short two paragraphs so that [fol. 39] there can be no doubt in the minds of the Court of Appeals about what I have to say.

Mr. Prentice. I will be grateful.

The Court. This is a suit brought by the New York, New Haven & Hartford Railroad Company to recover sums alleged to be due from the United States of America on account of a shipment on August 8, 1950, which defendant carried pursuant to government bill of lading No. N-17377473. The tariff rate for this shipment was $1,143.03. The plaintiff, on June 14, 1951, made demand upon the defendant for payment of that sum, which defendant refused and has continued to refuse to pay. Pursuant to the provisions of the Tucker Act (28 USC 1346) plaintiff brought suit in this court.

The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.

I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plainti-

tiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of set-
10 off or otherwise must be set up in the defendant's answer and proved by the defendant.

The Court: Is that clear enough?

Mr. Prentice. Yes, it is, your Honor.

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed November 4, 1955

1. Plaintiff moves that Summary Judgment be entered in its favor against the defendant in the sum of Four Hundred [fol. 40] and Two Dollars and Eighty-four Cents ($402.84), being the balance now due under the transportation contract set forth in the Complaint (See Affidavit attached hereto as Exhibit No. 1); together with interest lawfully allowable under 28 U.S.C.A. 2411; and costs allowable under 28 U.S.C.A. 2412.

2. If judgment is not rendered in Plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, the Plaintiff moves that the Court at the hearing on the Motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

3. This Motion is based upon the following:

(a). Complaint;
(b) Defendant's Answer and Substitute Answer;
(c) Plaintiff's Answer to Defendant's Counterclaim;
(d) Plaintiff's Interrogatories Addressed to Defendant; and
(e) Defendant's Answers and Objections to Plaintiff's Interrogatories;
(f) Affidavit of Plaintiff's Auditor.

4. The following facts are established:

(a). The plaintiff is a corporation organized under

the laws of Massachusetts; is a common carrier by rail in interstate commerce and is subject to the jurisdiction of the Interstate Commerce Commission. See Complaint, paragraph 1; Defendant's Substitute Answer, paragraph 1.

(b) On or about August 8, 1950 the Plaintiff delivered a carload of household effects to the Defendant at Newport, Rhode Island, thereby completing its performance of a transportation contract signed by the [fol. 41] Defendant and bearing Government Bill of Lading number X-17377473. See Complaint, paragraph 2; Defendant's Substitute Answer, paragraph 2.

(c) By authority of applicable tariffs duly published and filed with the Interstate Commerce Commission and applicable quotations of rates made to the Defendant under Section 22 of the Interstate Commerce Act by the Plaintiff and prior carriers the charges lawfully assessable for such transportation services were $1143.03. See Complaint, paragraph 3; Defendant's Substitute Answer, paragraph 3.

(d) On or about June 14, 1951 under its bill number F-251856 the Plaintiff made demand upon the Defendant for payment of $1143.03 which demand the Defendant refused to pay except the amount of $117.77. See Complaint, paragraph 4; Defendant's Substitute Answer, paragraph 4; Affidavit of Plaintiff's Auditor.

(e) In addition to the payment of $117.77 which the Defendant made against the Plaintiff's demand for $1143.03 (leaving as it would a balance of $1025.26) the parties by adjustment outside this action have agreed that the Defendant should be allowed a credit of $622.42 against said balance of $1025.26; which said computations result in a remaining balance due of the amount of $402.84. See Affidavit of Plaintiff's Auditor.

5. Plaintiff respectfully requests that judgment herein be entered nunc pro tunc the thirty-first day of October 1955.

[Signature and Certificate of Service omitted]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ASSISTANT AUDITOR OF FREIGHT RECEIPTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Raymond S. Aldrich of Hamden in the State of Connecticut, being put upon oath do depose and say:

[fol. 42] 1. I am the Assistant Auditor of Freight Receipts for The New York, New Haven and Hartford Railroad Company with offices at New Haven, Connecticut.

2. The records of this Company disclose the following:

(a) On or about June 14, 1951 under Number F-251856 this Company billed the Government in the amount of $1,143.03 for transportation under Bill of Lading No. N-17377473;

(b) On or about July 16, 1951 Government check No. 84600 in the amount of $117.77 was received by this Company and credited against the outstanding amount of $1,143.03;

(c) No other cash payment against said outstanding has been made.

(d) The following items of credit have been agreed upon through administrative negotiation outside the scope of this action:

(1) Against Bill No. F-165360:	$109.30
(2) Against Bill No. F-164498:	169.01
(3) Against Bill No. F-235076:	344.11
Total:	622.42

(e) The balance still due and owing to this Company at this time is $402.84.

3. I make the within statements with full knowledge that this affidavit is to be offered in support of Plaintiff's Motion for Summary Judgment in the

action on this matter now pending in the Federal Court for Massachusetts.

Dated at New Haven, Connecticut
this 3rd of November 1955

/s/ R. S. ALDRICH
Assistant Auditor of Freight Receipts.

[fol. 43] STATE OF CONNECTICUT
NEW HAVEN, ss November 3, 1955.

Personally appeared the above named Raymond S. Aldrich in his capacity as Assistant Auditor of Freight Receipts for The New York, New Haven and Hartford Railroad Company and made oath that the above statement by him subscribed is true.

Before me,

/s/ EDWARD C. BROOKS
Notary Public

My commission expires: April 1, 1957.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT—Filed November 15, 1955

Comes now defendant by its attorneys and moves that the Court enter judgment in its favor herein on the ground that defendant is entitled to judgment as a matter of law in that plaintiff has failed to plead facts entitling it to recover herein.

[Signatures omitted]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered November 23, 1955

WYZANSKI, D.J. Upon consideration of plaintiff's Motion for Summary Judgment supported by an affidavit showing one cash payment of $117.77 by the defendant and allowable credits to the defendant in the sum of $740.19 leaving a balance due plaintiff of $402.84; and

upon defendant's motion for entry of judgment on the ground that plaintiff has failed to plead facts entitling it to recover, it is

[fol. 44] ORDERED:

1—Defendant's motion denied
2—Plaintiff to recover from the defendant the sum of $402.84.

BY THE COURT:
/s/ GRACE V. FLOOD
Deputy Clerk.

November 23, 1955
/s/ WYZANSKI
United States District Judge.

Judgment entered Nov. 23, 1955
JOHN A. CANAVAN, *Clerk*
by /s/ GRACE V. FLOOD
Deputy Clerk

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 20, 1956

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on November 23, 1955.

[Signature omitted]

[fol. 45] PROCEEDINGS IN COURT OF APPEALS

* * * * *

ARGUMENT AND SUBMISSION OF CASE—May 1, 1956

[fol. 47] UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5090.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before. MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Warren E. Burger*, Assistant Attorney General, *Anthony Julian*, United States Attorney, and *Melvin Richter*, Attorney, Department of Justice, were on brief, for appellant.

Edmund M. Sweeney for appellee.

OPINION OF THE COURT—August 10, 1956

MAGRUDER, *Chief Judge*. This is an appeal from a summary judgment in favor of the New York, New Haven and Hartford Railroad Company against the United States in the sum of $402.84. Though the amount involved is small, this is a test case, determination of which will settle the government's liability in a number of similar suits.

In 1953 plaintiff Railroad filed its complaint in the district court against the United States under the Tucker Act demanding judgment in the amount of $1143.03 as payment [fol. 48] for transportation of a certain shipment of goods in 1950. A substitute answer filed by the

United States admitted liability for the amount demanded under the 1950 shipment, but pleaded payment in full, by a check for $117.77 in 1951 and by credits of $1025.26 on account of overpayments previously made in the settlement by the United States of four bills submitted by the plaintiff for transportation of goods in 1944—said credits being alleged to have been taken pursuant to § 322 of the Transportation Act of 1940 (54 Stat. 955). The answer contained this further allegation:

> "The said overpayments represent for the most part the difference between charges resulting from the use for computation purposes of carload minimum weights based on the size of car furnished and used, and the charges resulting from the use for computation purposes of carload minimum weights based on the size of car ordered by defendant and adequate for the shipment. Plaintiff at no time prior to, or subsequent to, the time of the filing of this suit furnished the defendant with facts with respect to its failure to provide defendant with the car ordered."

To this pleading the plaintiff filed an "answer" or reply, admitting the receipt of the check in the amount of $117.77 but denying that it had overcharged the United States with respect to the four shipments in 1944: "and the plaintiff further says that the defendant's determination of overpayment was arbitrary and capricious in that Service Order No. 68 as issued by the Interstate Commerce Commission on 30 January 1942 was in full force and effect and applicable thereto; and the plaintiff further says that it fulfilled its every obligation with respect to providing the defendant with any facts pertaining to such transportation."

It appears that with respect to the several shipments [fol. 49] of naval property in 1944 the initial carrier had furnished on each occasion a freight car of greater length than that ordered in the bill of lading, and that the plaintiff, as the terminal carrier (*not* the railroad which furnished the cars) had collected from the government at the higher rates applicable to the size of car furnished rather than at the lower rates applicable to the smaller freight cars ordered.

There had been a long-standing unwritten rule that a carrier held itself out as being able to furnish the cars listed in its tariff, and so could not charge more when it furnished cars larger than those ordered. This rule was carried into § 6(a) of Rule 34 of the rules of the ICC:

> "If carrier is *unable* to furnish open car of length ordered, and furnishes longer car, minimum weight shall be that fixed for car *furnished, except* that if articles are of such length as could have been loaded on car of length ordered, minimum weight shall be that fixed for car *ordered*." [Italics added.]

Under the foregoing rule it followed that, even if the carrier had been unable to supply the size of car ordered, it had to charge only for that size (provided, of course, that such a smaller car would have been big enough to carry the articles shipped). And if the railroad *was* able to furnish the car size ordered, but for its own convenience, or by error, it supplied a larger car (which would be an *a fortiori* case), § 6(a) of Rule 34 by its terms might not apply, but the earlier general unwritten rule required the railroad to make only the charge applicable to the smaller size of car ordered. In 1942, as a wartime measure to force shippers to make a fuller loading of cars, and thus to contribute to their more economical use, the ICC issued Service Order No. 68, above referred to, which, *inter alia*, [fol. 50] suspended the provision of § 6(a) of Rule 34 that had limited charges in the case of the substitution of a larger car to the amount chargeable for the smaller size car ordered. Thus, at the time in question here (1944), if the railroad was unable to furnish the size of car ordered, the railroad properly could bill the shipper for the size of car actually supplied. However, it was determined, and we think correctly, in *Atlantic Coast Line R.R. Co.* v. *United States*, 112 F. Supp. 594 (Ct. Cl. 1953), that where the carrier *was* able to furnish a car of the size ordered, but supplied a larger car, the proper billing was at the rate applicable to the car ordered. This was so because Service Order No. 68 purported only to suspend § 6(a) of Rule 34, whose terms referred to the situation of a carrier who was *unable* to furnish what was ordered; in the case of a carrier who

was able, but did not, furnish the size of car ordered, the old case law rule still governed.

Thus it will be seen that for the year now in question the availability to the carrier of certain sizes of cars became the controlling question of fact in determining the validity of the charges on bills of lading in which the shipper had specified the use of a freight car of a certain size.

In the district court the plaintiff addressed a long list of interrogatories to the defendant, some of which were answered and some objected to. At a hearing on the defendant's objections, the district court ruled that the plaintiff need allege nothing beyond the facts of the particular 1950 shipment set forth in the complaint, the bill for which transportation the United States had refused to pay. The court's ruling is indicated by the following two paragraphs dictated by the judge at the conclusion of the hearing:

> "The defendant contends that the plaintiff is not entitled to recover anything unless it shows that the [fol. 51] government has not made overpayments on prior transportation contracts and designated bills which are referred to in defendant's answer.
>
> I rule as a matter of law that it is not the burden of the plaintiff to set forth in this complaint anything with respect to those prior transportation contracts; and it is not the burden of the plaintiff to make any showing that on an overall basis the government has not overpaid the plaintiff. This is a suit upon a particular contract of transportation. Other contracts claimed by way of setoff or otherwise must be set up in the defendant's answer and proved by the defendant."

Thereafter, the Railroad filed a motion for summary judgment, with an affidavit attached to the motion indicating that through administrative negotiations it had accepted in part the credits asserted by the General Accounting Office, reducing its demand for judgment to the sum of $402.84. The United States moved for judgment in its favor on the ground that the Railroad had "failed to plead facts entitling it to recover herein." On November

23, 1955, the district court gave judgment for the Railroad in the amount of its reduced demand, at the same time denying defendant's motion for judgment. From this judgment the United States has taken the present appeal.

It seems to us that unless the Congress has definitely prescribed otherwise, the position of the United States as shipper, so far as the present case is concerned, is no different from that of a private shipper.

If a private shipper or consignee should pay the carrier before satisfying himself of the correctness of the charges demanded—as he may be required to do pursuant to § 3(2) of the Interstate Commerce Act and regulations of the Commission thereunder—and later sues for a refund of [fol. 52] alleged overpayments, or seeks to set off the amount of the overpayments against another claim admittedly due, in either case the shipper or consignee would have the burden of alleging and proving the fact and the amount of such overpayment.

On the other hand, if the private shipper or consignee should hold up payment of a shipping charge pending an audit to determine its correctness, and is thereupon sued by the carrier for the amount of the charge, of course the carrier would have the burden of alleging and proving the amount due.

Prior to 1940, the government, as shipper, followed the second of the foregoing courses. Payment by the government of transportation bills was accomplished in the same manner as for all other contracts. That is, an officer of the department concerned had to certify to a disbursing officer of his department that the bill was valid in all respects (service rendered, charges at lawful rate, computations correct, expenditure authorized by law, etc.), whereupon it would be paid. A bill that was doubtful in the eyes of the certifying officer would be forwarded to the General Accounting Office for its determination in advance of payment. See 33 Ops. Atty. Gen. 383 (1922). As a practical matter, it may be that the carriers were thus required to extend credit to the United States on account of shipping charges, though it seems that, under § 3(2) of the Act, the carriers were not required by law to relinquish possession of the shipment at destination prior to payment.

In § 322 of the omnibus Transportation Act of 1940 (54 Stat. 955), the Congress enacted as follows:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier . . . shall be made upon presentation of bills therefor, prior to [fol. 53] audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

The legislative history of § 322 furnishes no further light upon what the Congress may have had in mind with respect to the question before us, except that the inference is pretty clear that the section was remedial legislation passed at the behest of the carriers, who had complained of the inordinate delays of the pre-audit procedure theretofore prevailing which resulted in tying up large amounts of accounts receivable. See Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 10620, 75th Cong., 3d Sess. 35 (1938).

The United States urges us to read the last clause of § 322 as providing in effect that when an accounting officer, upon post-audit of a transportation charge, determines that a certain portion of the amount paid was an overcharge, he may direct the amount of such alleged overcharge to be set off against an amount subsequently found to be due to the carrier on another transaction; and that, when this is done, in order to recover the amount admittedly due on the subsequent transaction, the carrier must have the burden of alleging and establishing that there was no overpayment in the prior transactions used by the government by way of setoff.

We find no language in § 322 justifying this extraordinary result. All that § 322 does is to authorize and direct disbursing officers of the United States to pay transportation bills upon presentation, without waiting for audit or settlement by the General Accounting Office. This the United States might choose to do, just as a private shipper might pay the bills rendered by a carrier without making an audit.

[fol. 54] Section 322 concludes with the words, "but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We suppose that this provision was inserted out of an abundance of caution, because the availability of a setoff by the United States need not depend upon specific statutory authorization. "It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him." *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). See *Wisconsin Central R.R. Co.* v. *United States*, 164 U.S. 190, 206-10 (1896). The quoted language of § 322 reserves the right to the United States to offset "the amount of any overpayment." This means that, before the claimed setoff must be accepted in a judicial proceeding, the existence of such overpayment must be objectively determined, in fact and in law; it is not enough merely that some accounting officer has unilaterally asserted the existence of such overpayment. In the case at bar, the General Accounting Office has not even determined that there had been such overpayments; it claimed a "credit" for the difference between the amounts properly chargeable for the use of the freight cars actually supplied by the initial carrier and the amounts properly chargeable for the freight cars of the sizes requested in the bills of lading. But as we have seen above, the difference between these two amounts was not necessarily an overcharge in 1944. Whether it was an overcharge or not depended upon the establishment of an extrinsic fact, namely, at the time and place, was the initial carrier able to supply freight cars of the smaller sizes ordered? But in answer to one of plaintiff's interrogatories, the defendant stated that it was "without knowledge of whether a car of the size in feet ordered by defendant was available [fol. 55] to plaintiff and/or the initial carrier." In other words, the government's so-called post-audit did not undertake to determine the important extrinsic fact necessary to be established in order to sustain the claimed setoff.

In summary, we are in agreement with the very recent

statement of the Court of Claims, in *Atlantic Coast Line R.R. Co. v. United States*, 140 F. Supp. 569, 572 (1956), that, "Since the Government is seeking to set off, against an admittedly valid claim, a claim which it asserts arises out of another transaction, it has the burden of persuading us as to the validity of its offset."

Though there is nothing in the terms of § 322 that lends support to the government's position, it would be well, perhaps, to mention another possibility, which has no relation to § 322. It might be that, though the United States has the ultimate burden of proof to establish overcharges in the 1944 transactions which it used as a setoff or "credit" in the present case, yet proof by the United States that the carrier had furnished and charged for cars of larger size than ordered by the bills of lading could be regarded as making out a prima facie case to establish the validity of the claimed credits, entitling the United States to the benefit of a rebuttable presumption that the carrier had available, and could have supplied, cars of the lesser size ordered, and thus was guilty of overcharges. If this were so, then the burden would have been upon the carrier to go forward with evidence tending to rebut the presumption, failing which the validity of the setoff or credit would have been established.

Of course, rules as to burden of proof, rebuttable presumptions, burden of going forward with the evidence, etc., are established as matters of fairness, and convenience or availability of proof.

In the present case, if the statistical chances pointed [fol. 56] strongly to the likelihood that carriers, merely for their own convenience, frequently substituted larger cars for the smaller sizes ordered, it might be reasonable to have a rebuttable presumption to that effect. We gather from *Atlantic Coast Line R.R. Co. v. United States*, 140 F. Supp. 569, 572 (Ct. Cl. 1956), that this factual assumption was probably not so; that is, that it seemed to have been the practice of the carriers to furnish cars of the type ordered if such cars were reasonably available; but the record now before us throws no light upon the point one way or the other.

Again, if evidence as to the availability, at the time and place of shipment, of cars of the size ordered was pecu-

liarly within the knowledge of the carrier, it might be fair to impose upon the carrier the burden of coming forward with such evidence. That does not seem to be so in the case of the present appellee-plaintiff, which was the terminal carrier, not the initiating carrier. Also, in the circumstances of the present case, it is not clear to us that it would have been fair, even if the plaintiff had been the initiating carrier, to put upon such carrier this burden of going forward with the evidence on the point. We say this, because, due to the painfully slow pace of the post-audit by the General Accounting Office, it was not until 1950 that the government claimed a credit or off-set on account of alleged overcharges in 1944—and such records as the carrier was required to keep, assuming they would have established whether smaller cars were available, were not required to be kept more than three years. See *Atlantic Coast Line R.R. Co.* v. *United States*, 140 F. Supp. 569, 572 (Ct. Cl. 1956).

On the whole, we do not think that the record before us contains sufficient information to enable us intelligently to prescribe a judicially made rule as to a rebuttable pre- [fol. 57] sumption. Besides, the relevant factors are so complex and debatable that we probably ought not, in any event, to apply a rule of rebuttable presumption, absent a prescription by the Congress on the subject.

The judgment of the District Court is affirmed.

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—August 10, 1956

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD, *Clerk.*
By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

NOTE RE MANDATE

Thereafter, on August 28, 1956, mandate issued and the original papers were returned to the District Court.

CLERK'S CERTIFICATE OMITTED ON PRINTING

* * * * *

[fol. 59] SUPREME COURT OF THE UNITED STATES

[title Omitted]

* * * * *

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November fifteenth, 1956.

FELIX FRANKFURTER
Associate Justice of the Supreme Court of the United States.

Dated this fifth
day of November, 1956.

[fol. 60] SUPREME COURT OF THE UNITED STATES

[Title Omitted]

* * * * *

ORDER ALLOWING CERTIORARI. Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and case transferred to the summary Calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1957 431603 1475